88-809

FILED
OCT 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TOMMY DAVIS AND FRANCES DAVIS

APPELLANTS

VS.

DECHIARO LIMITED PARTNERSHIP
RALPH DECHIARO ENTERPRISES B, INCORPORATED
CHOICE DEVELOPMENT CORPORATION

APPELLEES

ON APPEAL FROM THE COURT OF APPEALS OF
THE STATE OF MARYLAND

JURISDICTIONAL STATEMENT

Tommy Davis and Francis Davis
6314 Benhurst Road
Baltimore, Maryland 21209
(301) 764-7261
Pro se

I. Questions Presented by This Appeal

1. Whether Dorothy DeChiaro's and Ralph DeChiaro's failure to develop Benhurst Park, a planned residential development, in accordance with *Baltimore City Ordinances 417* and *690* and the specifications of the *Final Subdivision Plat of Benhurst Park* as recorded among the Land Records of Baltimore City, a Plat which was made law by Mayor William Donald Schaefer and the Baltimore City Council, violates the constitutional rights of Tommy Davis and Frances Davis with respect to equal protection of the law and due process?

2. Whether Dorothy DeChiaro's and Ralph DeChiaro's failure to honor the terms of the *Contract of Sale,* under seal, dated 17 February 1980, and the *Deed,* under seal, to the property of Tommy Davis and Frances Davis, dated 22 September 1980, violates the constitutional rights of Tommy Davis and Frances Davis with respect to equal protection of the law and due process?

3. Whether Dorothy DeChiaro's and Ralph DeChiaro's preparing for Ryan Homes a Plat which was *NOT* approved by the Mayor and City Council of Baltimore City but which superseded the 690 Plat, the one made law by the Mayor and City Council of Baltimore City, violates the law and the constitutional rights of Tommy Davis and Frances Davis with respect to equal protection of the law and due process?

4. Whether Choice Development Corporation's failure to follow the specifications of the *Declaration of Covenants, Conditions, Restrictions and Easements,* Liber WA 3907 folio 611, dated 28 March 1978; *Deed of Cross Easement,* Liber R.H.B. No. 3176, folio 440, dated 18 October 1974; *Deed of Easement,* Liber R.H.B. No 3321, folio 623, dated 8 January 1976; *Maintenance*

Agreement-Detention Pond, Liber R.H.B. No. 3321, folio 630, dated 8 January 1976; *First Amendment to Deed of Cross Easement,* Liber R.H.B. No. 3321, folio 593, dated 3 February 1976; *Road Maintenance Agreement,* Liber R.H.B. No. 3321, folio 611, dated 3 February 1976; *Deed of Easement and Maintenance Agreement,* Liber R.H.B. No. 3321, folio 639, dated 3 February 1976; *Agreement,* Liber R.H.B. No. 3627, folio 813, dated 30 May 1978; *Public Utility Agreement,* Liber JFC 1913, folio 580; and *Agreement with Mayor and City Council of Baltimore,* Liber JFC 1935, folio 357—all of the aforesaid are recorded among the Land Records of Baltimore City, violates the constitutional rights of Tommy Davis and Frances Davis with respect to equal protection of the law and due process?

II. Parties to the Proceedings Below

Tommy Davis and Frances Davis were the plaintiffs-appellants-petitioners and DeChiaro Limited Partnership, Ralph DeChiaro Enterprises B, Incorporated, and Choice Development Corporation were the defendants-appellees-respondents in all proceedings below in the Courts of Maryland.

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

TOMMY DAVIS AND FRANCES DAVIS

Appellants,

vs.

DECHIARO LIMITED PARTNERSHIP
RALPH DECHIARO ENTERPRISES B,
INCORPORATED
CHOICE DEVELOPMENT CORPORATION

Apellees.

ON APPEAL FROM THE COURT OF APPEALS OF
THE STATE OF MARYLAND

JURISDICTIONAL STATEMENT

IV. Opinions Below

The Court of Appeals of Maryland denied appellants' timely filed petition for a Writ of Certiorari to review the decision of the Court of Special Appeals of Maryland, thereby effectively adopting the decision of

the Court of Special Appeals of Maryland. Notice of the decision of the Court of Appeals of Maryland is attached hereto as part of the Appendix. This is an appeal from the unreported Judgments of the Court of Special Appeals of Maryland, entered February 22, 1988. The decision of the Court of Special Appeals of Maryland is attached hereto as part of the Appendix. See Appendix at 1a and 2a.

V. Statement of Jurisdiction

A. Nature of Proceedings

This appeal involves the failure of the Court of Appeals of Maryland to address the questions on their merits in its denial of appellants' petition for writ of certiorari. That petition clearly set forth more than adequate grounds for granting such writ. Appellants' notice of appeal to this Court was filed August 29, 1988, in the Court of Appeals of Maryland, the Court of Special Appeals of Maryland, and the Baltimore City Circuit Court, the Court possessed of the record, and copies thereof were served upon all parties to the proceedings below. See Appendix at 3a.

B. The Date of the Entry

June 16, 1988, the Court of Appeals of Maryland entered an Order that the petition be "denied as there has been no showing that review by certiorari is desirable and in the public interest," thereby effectively adopting the Judgments of the Court of Special Appeals of Maryland. The notice of appeal was timely filed with the Court of Special Appeals of Maryland. The copy of appellants' notice of appeal to the Court of Special Appeals of Maryland is included in their com-

plete file which is not available to them and is being held by Attorneys Barbara Doering and Marianna Burt, 4324 York Road, Baltimore, Maryland 21212.

C. **Jurisdiction of this Court**

Jurisdiction of this Court to review by direct appeal the Order of the Court of Appeals of Maryland which effectively adopted the decision of the Court of Special Appeals of Maryland is conferred by 28 U.S.C. § 1253. Jurisdiction of this Court to review aggrieved citizens' deprivation of federally protected rights caused by persons under color of law is based upon 28 U.S.C. § 1343 on appellants claim under 42 U.S.C. § 1983.

VI. Constitutional Provision

United States Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VII. Statement of the Case

Appellants retained in November 1985 the law firm of George L. Russell and Kenneth Thompson to seek recovery from Dorothy DeChiaro and Ralph DeChiaro who broke contracts under seal with appellants and from Choice Development Corporation who violated Baltimore City Ordinances 417 and 690 with an accompanying Plat and the *Declaration of Covenants, Conditions, Restrictions* and *Easements* and other regula-

tions governing the planned residential development in which appellants reside. Just as construction began on houses that were being built in violation of the law, actual notice was sent to appellees in October and November 1985, indicating that appellants would seek legal redress in the courts. Appellants learned in September 1986, just about two weeks before their trial date, that Russell and Thompson had dropped DeChiaro from their suit in March 1986. Without legal counsel, appellants tried to prepare for trial and subpoenaed Governor William Donald Schaefer, Representative Benjamin Cardin, Ralph DeChiaro, and other principal who are knowledgeable of the planned residential development. The trial was canceled on the day it was scheduled to take place. The appellees requested a hearing before Judge Thomas Ward November 5, 1986. Judge Ward denied a summary judgment to DeChiaro, indicated that he alone would handle the case, and allowed appellants to prepare a Fourth Amended Complaint since appellees' lawyers were not clear about the specific complaint. Judge Thomas Ward asked the lawyers for the appellees if their clients had in fact violated the contracts and laws in question; the lawyers answered yes. Judge Ward then asked if the lawyers were willing to admit to the trial judge that their clients had broken the laws and contracts in question; the lawyers again answered yes. Judge Ward suggested that the lawyers for the appellees settle the case out of court. No formal request has been made to appellants by the lawyers for the appellees to settle the case out of court. Because of the time restriction imposed by Judge Ward, appellants filed a Fourth Amended Complaint. Barry Steelman and Harry Turner were retained to represent appellants. Steelman and Turner in collu-

sion with Judge Thomas Ward used a trick of subterfuge to get a summary judgment for appellee DeChiaro. When appellants confronted Steelman and Turner and Judge Ward about the trick of subterfuge they used to get DeChiaro out of the suit, Judge Ward would not allow the appellants to fire Steelman and Turner. Appellants were told by Judge Ward that they could not retain any other lawyers. See Appendix at 4a, 5a, and 6a. Appellants were also denied a jury trial by Judge Ward. The details of the collusion, conspiracy and culpability are too numerous to set forth here. The questions sought to be reviewed were raised by the appellants in the Court of Appeals, the lawyers for the appellants having dealt with procedural matters. This court should be aware of the fact that an automobile accident was arranged to take the life of appellant Frances Davis, and the Baltimore Police Department refuses to investigate the appellants allegation of a falsified police report.

VIII. The Questions Presented Are Substantial

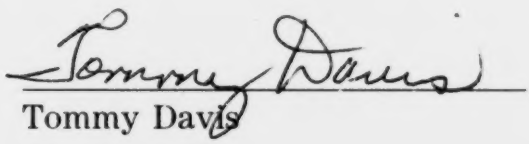
This appeal presents this Court with the opportunity to insure the basic rights of *bona fide* citizens. The Fourteenth Amendment's promise of equal protection of the laws and equality before the law should be available to every citizen and no citizen should be above the law. This Court is called upon to operate in the best interests of all the people to insure each citizen's personal rights which should be secured by the Civil Rights Act of 1964. Clearly, this Court should not be deterred from accepting this appeal and resolving the questions presented by the failure of the Court of Appeals of Maryland to address the questions on their merits in its denial of appellant's petition for writ of

certiorari. This Court is especially *necessary* to protect from subversion or erosion the constitutional rights of all individuals and to preserve the civil liberties of all individuals.

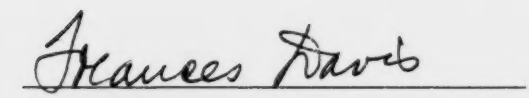
CONCLUSION

This case presents substantial constitutional questions regarding equality before the law and due process, rights associated therein which are guaranteed under the Fourteenth Amendment to the United States Constitution. To allow the decisions of the Courts of Maryland to stand would deal a serious blow to the fundamental concepts of equal protection, due process, and equality before the law. Accordingly, this Court is respectfully requested to accept this appeal and resolve the questions presented.

Respectfully submitted,



Tommy Davis



Frances Davis

Pro se
6314 Benhurst Road
Baltimore, Maryland 21209
(301) 764-7261

CERTIFICATE OF SERVICE

The Appellants hereby certify that we have this day served each party in this action with three copies of the foregoing Jurisdictional Statement by depositing three copies of the same in the United States mail, with first class postage prepaid, addressed as follows:

S. Leonard Rottman, Esquire
Suite 1115, The Blaustein Building
One North Charles Center
Baltimore, Maryland 21202

and

Gordon Heyman, Esquire
2221 Maryland Avenue
Baltimore, Maryland 21218

counsel for the Appellees. This 26th day of October, 1988.

Tommy Davis

Tommy Davis

Frances Davis

Frances Davis

Tommy Davis, et ux

v.

DeChiaro Limited Partnership, et al
DeChiaro Limited Partnership, et al

v.

Ryan Homes, Inc.

In the Court of Appeals of Maryland

Petition Docket No. 69
September Term, 1988

No. 493, September Term, 1987
(Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: June 16, 1988

Unreported
In the Court of Special Appeals of Maryland

No. 493

September Term, 1987

Tommy Davis, et ux

v.

DeChiaro Limited Partnership, et al

DeChiaro Limited Partnership, et al

v.

Ryan Homes

Gilbert, C.J.
Alpert
Bell, Robert M.

JJ.

Per Curiam

Filed: February 22, 1988

The main players in this appeal from judgments of the Circuit Court for Baltimore City are Tommy Davis and Frances Davis, appellants, DeChiaro Limited Partnership and Ralph D. DeChiaro Enterprises, Inc., appellees/cross-appellants, (hereinafter, collectively "DeChiaro",) and Choice Development Corporation, appellee, (hereinafter "Choice".)[1] Appellants' challenge to the judgments entered in favor of DeChiaro and Choice raises four questions:

> 1. Did the court below err in granting the motion for summary judgment on behalf of the DeChiaro group?
>
> 2. Did the court below err in denying appellants' jury trial?
>
> 3. Did the court below err in granting partial relief for appellees Choice and DeChiaro in December, 1986 and by granting Choice's motion for judgment in February of 1987?
>
> 4. Did the court below err in striking appellants' sixth amended complaint?

We will affirm.

The issues presented are, at bottom, reasonably simple; however, the procedural posture of the case is enormously complex. The events leading to this appeal all began when, in 1980, appellants contracted with

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[1]DeChiaro filed a third-party complaint against Ryan Homes, Inc., cross-appellee, seeking indemnification and or contribution against Ryan in the event that appellants were successful in their suit against DeChiaro as it related to certain lots DeChiaro sold to Ryan. Ryan's motion to strike DeChiaro's third-party complaint was granted and DeChiaro appealed. In view of the conclusion we reach with regard to the main appeal we need not consider DeChiaro's cross-appeal.

DeChiaro to purchase lot 11 in Benhurst Park. Benhurst Park was, and remains, a planned residential development created, in accordance with the Baltimore City Code, Art. 30, §§ 12.0-1 and 2, pursuant to Baltimore City Ordinance No. 417. In order to define and restrict the nature of the development planned for Benhurst Park, DeChiaro caused to be recorded among the Land Records of Baltimore City a Declaration of Covenants, Conditions, Restrictions and Easements, dated March 28, 1978, and a Revised Final Subdivision Planned Parcel, "B". The Declaration provided:

> "that the properties within Benhurst Park shall be held, sold and conveyed subject to [certain] restrictions, covenants, conditions and easements which are for the purpose of protecting the value and desirability of, and which shall run with , the real property and be binding on all parties having any right, title or interest in the described properties or any part thereof, their heirs, personal representatives, successors and assigns, and shall inure to the benefit of each owner thereof."

The contract between appellants and DeChiaro provided that DeChiaro would construct on lot 11 the dwelling which appellants selected from among the three models offered by DeChiaro. At settlement, appellants received a deed which referenced the Declaration. Thus, appellants' property, by the express terms of their deed, was conveyed subject to the Declaration. Among the covenants by which Benhurst Park, including appellants' property, was benefitted were those restricting both the location of the dwellings to be constructed on individual lots and the location of windows or openings on those dwellings.

After appellants settled on their home, DeChiaro sold

lots in the development to other developers, including Choice. One of the lots purchased by Choice, lot 12, was adjacent to appellants' lot. Choice, having obtained a building permit, began constructing a dwelling on that lot in October, 1985. Appellants, believing that construction to be in violation of the development plan for Benhurst Park, notified both DeChiaro and Choice of their concerns. Dissatisfied with their response and being unable to resolve the problems, appellants filed an action against DeChiaro and Choice seeking an ex parte injunction, declaratory relief and damages. Appellants also filed a notice of *lis pendens* with regard to lot 12.

The complaint, filed March 11, 1986, pertained only to the construction proceeding on lot 12. Its allegations included the following: that DeChiaro misrepresented the manner in which Benhurst Park would develop; that appellants detrimentally relied upon those misrepresentations; that DeChiaro and Choice, in joint venture, were responsible for the construction on lot 12; that the construction was in violation of the "covenants and conditions restricting [Ralph DeChiaro] Enterprises [Inc.] and all future purchasers of property located in Benhurst Park"; and that the construction on lot 12 "irreparably injures" appellants' "maximum enjoyment" of their property, their privacy rights, and the aesthetic value of their property. In support of these allegations, the complaint detailed the circumstances surrounding appellants' purchase of lot 11 from DeChiaro and recited the restrictions on development contained in the Declaration, which appellants deemed applicable. The relief prayed included an order enjoining the construction on lot 12 and the removal of that already completed; a declaration of appellants'

rights under the Declaration, and unspecified "damages for the harm caused by Respondent's actions." No prayer for jury trial accompanied the complaint.

Choice answered the complained on May 19, 1986. Twenty-one days later, on June 9, 1986, appellants filed their first amended complaint. That complaint named only Choice as a defendant and, in addition to restating those of the original complaint, added allegations that the construction on other lots, namely 13, 14, and 15, also violated the Declaration. It also contained a request for a jury trial and a prayer for a specific dollar amount in damages. As in the case of lot 12, the court was asked to order removal of the houses being constructed in the challenged lots. Choice moved to strike appellants' request for ajury trial.

Appellants filed two additional amended complaints prior to November 13, 1986,[2] the date on which Choice's Motion to strike Jury Request was granted and appellants were granted leave to file yet another amended complaint. The second amended complaint, essentially a restatement of the first, added an additional lot, lot 16. The third amended complaint, which once again named DeChiaro as a defendant, restated the previous allegations against DeChiaro—that it breached its contract with appellants and misrepresented how Benhurst Park would be developed. Although it repeated the allegations that Choice built on lot 12 in violation of the Declaration, the complaint contained no allegations as to lots 13, 14, 15, 16. Neither of these contained a prayer for a jury trial.

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[2]The original complaint as it pertained to DeChiaro was dismissed pursuant to this order.

Pursuant to the leave they were granted, appellants filed on November 18, 1986 their fourth amended complaint, which sought seven million dollars in damages from appellees DeChiaro and Choice and the removal of the houses constructed on lots 12, 13, 14, 15, 16 and 5.[3] Appellants' allegations as to DeChiaro sounded essentially in fraud and breach of contract. Those as to Choice remained basically the same as in previous complaints, except that appellants asserted that the Choice construction was contrary to the representations made to appellants by DeChiaro. Appellants prayed a jury trial.

DeChiaro responded to the fourth amended complaint by filing, on November 26, 1986, a third-party action against Ryan Homes, Inc., motions to dismiss the fourth amended complaint and to strike appellants' request for a jury trial and, on December 4, 1986, a motion for summary judgment. Choice also moved to strike the request for jury trial and to dismiss the fourth amended complaint. A hearing on all open motions was scheduled to be held on December 18, 1986.

Appellants filed their fifth amended complaint with the court on the date of hearing. In that complaint, consisting of six counts, they alleged: breach of the Declaration by DeChiaro and Choice (Count 1); breach of the Baltimore City Ordinance by the same defendants (Count 2); misrepresentation by DeChiaro (Count 3); negligent misrepresentation by DeChiaro (Count 4); violation of the Maryland Consumer Protection Act by DeChiaro (Count 5); and conspiracy between DeChiaro

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[3]This is the first time that appellants raised any contentions as to lot 5.

and Choice (Count 6). In addition to monetary damages against both DeChiaro and Choice, appellants once again, in counts 1 and 2, asked the court to order the removal of the dwellings constructed on lots 5, 12, 13, 14, 15, and 16. They did not pray a jury trial, however.

Despite the lateness of the filing of the fifth amended complaint, the hearing judge proceeded with the hearing, deciding the pending motions in light of that complaint, rather than the one in response to which they were filed. At the end of the hearing, he concluded that DeChiaro's motion for summary judgment should be denied, without prejudice to revision or renewal at a later time,[4] and that Choice's motion to dismiss should be granted, with prejudice, as to count 6 and "those portions of counts 1 through 5" which sought removal of the dwellings constructed on all of the lots, except lot 12. DeChiaro's motion to dismiss was denied; however, the judge acknowledged DeChiaro's entitlement to benefit from the relief granted Choice to the extent that its motion also sought that relief. Both Choice's and DeChiaro's motion to strike appellants' request for jury trial was granted, the court ruling that "no timely demand for a jury [had] been made in this action pursuant to Rule 2-325".[5]

The parties were once again before the court on December 24, 1986, this time to permit the court to consider DeChiaro's request for postponement of the trial

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[4]Although the court order states that the motion was denied, the transcript of the hearing reveals that the hearing judge determined that only the fraud allegations had merit.

[5]The court granted Ryan Homes, Inc.'s motion to strike DeChiaro's third-party claim against it, without prejudice to DeChiaro's later pursuit of the claim in a separate action.

date. Prior to the hearing, DeChiaro filed a supplementary motion for summary judgment, supported by affidavit, and directed at appellants' fraud allegations. After hearing arguments on the point, summary judgment was entered in favor of DeChiaro. Thus, the only remaining defendant was Choice and, then only as to counts 1 and 2 as they pertained to lot 12.

Appellants' action against Choice went to trial on February 5, 1987. Prior to that date, on January 21, 1987, despite summary judgment having been entered for DeChiaro, appellants filed yet another amended complaint. Although it sought essentially the same relief, the complaint named DeChiaro as a defendant. The court, on Choice's motion, struck the sixth amended complaint before trial and awarded Choice $150.00 in counsel fees. At the end of appellants' case, which consisted only of appellant Frances Davis' testimony, the trial judge granted Choice's motion for judgment. He ruled that appellants failed to prove damages, a violation of the Declaration, or any misrepresentation made by Choice.

1.

Appellants' initial complaint concerns the property of the hearing judge's grant of DeChiaro's motion for summary judgment. They assert that, because their cause of action against DeChiaro involved DeChiaro's intent, and intent is necessarily an issue of fact to be resolved by the jury, *see DiGrazia v. County Executive for Montgomery County,* 288 Md. 437, 445 (1980); *Townsend v. L.W.M. Management, Inc.,* 64 Md. App. 55, 64, *cert. denied,* 304 Md. 300 (1985), summary judgment should not have been granted. Therefore, they argue the hearing judge erred. We do not agree.

"In reviewing a ruling by the lower court on a motion for summary judgment, we, like the lower court, must resolve all inferences against the moving party and determine whether there is a genuine dispute as to any material fact and whether the moving party is entitled to judgment as a matter of law." *Schlossberg, Trustee v. Epstein Et Al*, Md. App. , (No. 402, September Term, 1987, filed January 6, 1988). *See* Maryland Rule 2-501(e). While not a substitute for trial, *Coffey v. Derby Steel Company, Inc.*, 291 Md. 241,247 (1981); *Berkey v. Delia*, 287 Md. 302, 304 (1980); *May Dept. Stores v. Harryman*, 65 Md. App. 534, 538 (1985), *aff'd*, 307 Md. 692 (1986), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, admission, and affidavits show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(e). *Brady v. Ralph Parsons Company*, 308 Md. 486, 495 (1987). In determining whether there is a genuine dispute as to any material fact, Rule 2-501(b) is important. That Rule provides:

> (b) *Response.*—The response to a motion for summary judgment shall identify with particularity the material facts that are disputed. When a motion for summary judgment is supported by an affidavit or other statement under oath, an opposing party who desires to controvert any fact contained in it may not rest solely upon allegations contained in the pleadings, but shall support the response by an affidavit or other written statement under oath.

It is also well to remember that, even if there is a dispute as to a material fact, a party still may be en-

titled to summary judgment as a matter of law if the facts pled do not constitute a cause of action or provide a basis for relief.

The causes of action pled against DeChiaro in the fifth amended complaint were essentially of two types: (1) breach of the restrictive covenants (counts 1, 2, 5, and 6) and fraud (counts 3 and 4). Of significance to the former is the fact that, at the time appellants brought their action, DeChiaro no longer owned the land to which the restrictive covenants related. *Gallagher v. Bell*, 69 Md. App. 199 (1986), *cert. denied*, *Bell v. Gallagher*, 308 Md. 382 (1987) instructs that "[t]he continuing liability of an original covenantor on a [restrictive] covenant . . . will end upon his conveyance of the burdened property if the parties intended for that to be the case. . . ." *Id.*, 69 Md. App. at 220. There, although recognizing that intent is usually a question of fact, we concluded, as a matter of law, from the circumstances of the creation of the covenant at issue, that the parties did not intend the original covenantor to be liable for breach of the covenant once he disposed of the property. That the covenant was made to run with the land was an important factor in our reaching that conclusion. The situation *sub judice* is not very different. Indeed, the manner in which the restrictive covenants were imposed upon the land in Benhurst Park also suggests that the parties here intended liability for violation of the covenants to fall upon the owners of the property. *See Gallagher v. Bell*, 69 Md. App. at 217-220.

There is another reason why the hearing judge did not err in granting summary judgment as to the counts alleging violation of the Declaration. As we pointed out above, when a motion for summary judgment is sup-

ported by affidavit, the opposing party, if he or she wishes to controvert the facts asserted, must file a counter affidavit or deposition. DeChiaro filed, with its original motion, affidavits which denied that misrepresentations were made to appellants concerning the manner in which Benhurst Park must be developed.[6] Appellants filed no counter affidavits. Consequently, they, in effect, admitted the statements of fact contained in the DeChiaro affidavits. *See Weaver v. Realty Growth Investors,* 38 Md. App. 78, 83 (1977); *Roe v. Citizens National Bank,* 32 Md. App. 1, 11 (1976).

The foregoing is equally applicable to the grant of summary judgment as to the fraud counts. The issue in those counts was whether DeChiaro knowingly misrepresented the manner in which the development would occur. Pertinent to that issue was a plat prepared for Ryan Homes, Inc. which seemed to indicate a development pattern different from that reflected in the Final Subdivision Plan, on which appellants relied when they purchased their property. The Ryan Homes plat contained two dates: one, November 26, 1979, prior to appellants' purchase of their home and the other, June 2, 1983, after the purchase and clearly subsequent to the sale of certain lots to Ryan Homes. Appellants contended that DeChiaro was aware, when it sold lot 11 to appellants, that Ryan Homes intended to develop the property it purchased from DeChiaro differently than that contemplated by the Final Subdivision Plan. Indeed it was on this basis that the hear-

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[6]The affidavit were those of a real estate sales agent, Harriet Miller, and a principal of DeChiaro, Lawrence R. Rachuba.

ing judge denied DeChiaro's motion for summary judgment on December 18, 1986.

The affidavit attached to DeChiaro's supplemental motion for summary judgment was by the architect who, in 1983, after Ryan Homes had purchased the land from DeChiaro, prepared the Ryan plat. In it, he averred that the plat was prepared for Ryan Homes, without any input from DeChiaro. Thus the affidavit tended to refute appellants' fraud theory. Appellants did not file a counter affidavit, controverting the affiant's averments therein, thereby, in effect, admitting them. We are aware that the supplemental motion and the accompanying affidavit were filed just prior to the December 24, 1986 hearing; however, we are also aware that appellants at no time requested an opportunity to file an opposing affidavit.

We hold that the trial judge did not err in granting summary judgment in favor of DeChiaro.

2.

Appellants next complain that they were denied a jury trial. Specifically, they contend that their prayer for jury trial submitted with their fourth amended complaint was timely since that Complaint raised "issues" not pled in the third amended complaint and, thus, was the last pleading directed towards those new "issues'. They rely upon Neimeyer and Richards, *Maryland Rules Commentary,* 1984, p. 60.

Although appellants mention that they were denied a jury trial on two occasions during the proceedings, the focus of their argument is upon the striking of the

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prayer attached to their fourth amended complaint. Appellant's first prayer for jury trial was filed with appellants' first amended complaint, twenty-one days after Choice filed its answer to the original complaint. That prayer was stricken, on Choice's motion, as untimely filed. It is not clear that that ruling is challenged on appeal.

Maryland Rule 2-325(b) provides:

> The failure of a party to file the [jury trial] demand within 15 days after service of the last pleading filed by any party directed to the issue constitutes a waiver of trial by jury.

It is derived from Federal Rule of Civil Procedure 38(b) and (d). Therefore, its meaning may be determined by reference to federal law. *See Higgins v. Barnes,* 310 Md. 532, 543 (1987).

The meaning of the word "issue" as used in Rule 2-325(b) is dispositive of this issue. That meaning must be determined from the context in which the word is used in the Rule and from the interpretation of FRCP 38(b) and (d) by the federal courts.

Although the word "issue" is not explained or defined in Rule 2-325 (b), both § (a), dealing with jury trial demand, and § (e), concerning the effect of an election, make clear that a jury trial may be prayed only as to an "issue triable of right by a jury". This strongly suggests that the "issue" to which the rule is directed is fact based; it does not refer to a theory of recovery, which necessarily involves a question of law. *See Trixler Brokerage Co. v. Ralston Purina Co.,* 505 F.2d 1045, 1050 (9th Cir. 1974). If this were not so, a party, simply by adding a theory of recovery, *i.e.,* an additional

count, and without changing the factual predicate, could pray a jury trial virtually anytime he or she wishes. That cannot be the intent of the Rule.

The federal courts' interpretation of FRCP 38(b) and (d) supports this view; they have interpreted the Rule as precluding a prayer for jury trial when only an additional legal theory of recovery has been pled. In *Rosen v. Dick,* 639 F.2d 82, 94 (2d Cir. 1980), for example, the Court said:

> . . . Rule 38 suggests that the jury trial right extends only to disputed factual conclusions. By extending the time period for demanding jury trial until 10 days after the service of the last pleading directed to such issue", Rule 38(b) thereby allows a party to wait for a responsive pleading which shows whether an issue of fact exists before making the jury demand. (citation omitted)

In Re N-500L cases, 691 F.2d 15, 23 (1st Cir. 1982), is of similar import:

> If the factual allegations underlying two claims are the dame or if the issues "turn on the same matrix of facts" the issues are the same . . . It is both the similarity of facts and the similarity of the matrix—the legal framework in which facts are analyzed—that make issues the same. On the other hand, slight modifications in facts or in the legal theories presented will not usually render issues different. (Citations omitted).

See also Trixler Brokerage Co., supra.

Appellants' argument makes clear that they rely upon the inclusion, in the fourth amended complaint, of theories of recovery not filed in the third amended complaint, to justify an entitlement to a jury trial. They do not contend and we agree, that the factual basis for

the previously filed complaints is significantly different than the factual basis for the fourth amended complaint.

Appellants' fourth amended complaint differs from its third only to the extend that it challenges construction on lots omitted from the third amended complaint. Those lots, however, were included in appellants' second amended complaint, as to which appellants did not pray a jury trial. Since the fourth amended complaint does not plead any significantly different facts than the preceding complaints, we hold that the trial judge did not err in striking appellants' prayer for jury trial.

3.

In challenging the propriety of the court's grant of partial judgment in favor of Choice and DeChiaro on December 24, 1986 and its grant of Choice's motion for judgment at the end of appellants' case on January 6, 1987, appellants only argument rests upon the availability of "equitable relief . . . whether or not the covenant runs with the land." They simply point out the three criteria, set out in *Levy v. Dundalk Co.*, 177 Md.636, 646, (1940), which must be met to enforce a restriction upon the use and dominion of land, and assert that they are present in this case. Appellants then conclude that "(t)he Court's dismissal of the Complaint against Choice based partially on its finding that Choice was not obligated for acts of DeChiaro was in error, given Maryland law" and that "[a]ppellants have met the notice requirement—they sent letters to Choice and called DeChiaro informing them of the violation

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of the restrictions." They do not present any argument as to the manner in which Choice and DeChiaro violated the restrictive covenants, nor do they provide us with any basis for concluding that they are entitled to relief as to lots 5, 13, 14, 15, and 16. And we are not apprised, with any degree of specificity, as to why the court erred in granting Choice's motion for judgment.

Having considered appellants' argument, we find it to be singularly unpersuasive. When reviewing a trial court's grant of a motion to dismiss, we assume the truth of all well pleaded allegations of relevant and material facts as well as of all inferences which could reasonably be drawn from the pleadings. *Sharrow v. State Farm Mutual,* 306 Md. 754, 768 (1986); *Ungar v. State,* 63 Md. App. 472, 479 (1985), *cert. denied,* U.S. , 106 S.Ct. 1379 (1986). Any ambiguity or uncertainty in the allegations bearing on whether the complaint states a cause of action is construed against the pleader. *Sharrow,* 306 Md. at 768. Applying this test to the fifth amended complaint, we hold that the trial judge did not err in granting DeChiaro's motion to dismiss as to counts 1 through 5.[7]

We are equally satisfied that the trial judge's grant of Choice's motion for judgment at the end of appellants' case was not error. Among the grounds given by the trial judge for granting the motion was that appellants failed to prove damages. We have reviewed the record and reach the same conclusion. For that

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[7]Although the trial judge granted Choice's motion to dismiss as to count 6 as well, appellant does not challenge that ruling here.

reason alone, if not for the other reasons given by trial judge,[8] we think the motion was properly granted.

4.

Appellants' final complaint is that their sixth amended complaint was erroneously stricken. We do not agree.

Appellants filed their sixth amended complaint on January 21, 1987. The trial in this matter was scheduled for February 5, 1987. Thus, the sixth amended complaint was filed within 15 days of the date of trial. Leave of court, or the written consent of the adverse party was therefore necessary to authorize its filing. *See* Md. Rule 2-341(b). Since Choice's motion to strike the complaint was granted, the only issue presented, as appellant recognizes, is whether, in so doing, the trial judge abused his discretion. Appellants state in their brief that the court would not have abused its discretion had it denied the motion to strike, a statement with which we agree. On the other hand, it is as true that the court did not abuse its discretion when it granted the motion. This is especially true when, as here, the complaint would have brought back into the case a party who had recently been let out on summary judgment.

JUDGMENTS AFFIRMED.
COSTS TO BE PAID BY APPELLANTS.

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[8]The court also found that the construction on lot 12 did not violate the restrictive covenants and that Choice was not bound by representations which might have been made to appellants by DeChiaro's agent.

Tommy Davis and
Frances Davis, His Wife
6314 Benhurst Road
Baltimore, Md. 21209

Plaintiffs,

v.

DeChiaro Limited
Partnership
700 Fairmont Avenue
Towson, Md. 21204

and

Ralph DeChiaro
Enterprises, Inc.
700 Fairmount Avenue
Towson, Md. 21204

and

Choice Development
Corporation
7444 Holabird Avenue
Suite A
Baltimore, Md. 21222

Defendants.

In the

Court of Appeals

of

Maryland

Petition Docket No. 69

September Term, 1988

(No. 493,

September Term, 1987

Court of

Special Appeals)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Plaintiffs, Tommy Davis and Frances Davis, his wife, hereby appeal to the Supreme Court of the United States, from the order of this Court entered in this action on the 16th day of June, 1988. The Plaintiffs will proceed *pro se* until legal counsel can be obtained.

This appeal is taken pursuant to 28 U.S.C. §1253, 28 U.S.C. §1343, and 42 U.S.C. §1983.

This 29th day of August, 1988.

Tommy Davis

Frances Davis

6314 Benhurst Road
Baltimore, Maryland 21209
(301) 764-7261

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CERTIFICATE OF SERVICE

The Plaintiffs hereby certify that on this 29th day of August, 1988, a copy of the foregoing Notice of Appeal was mailed to S. Leonard Rottman, Esquire, Suite 1115, The Blaustein Building, One North Charles Center, Baltimore, Maryland 21201 and Gordon Heyman, Esquire, 2221 Maryland Avenue, Baltimore, Maryland 21218, counsel for the Defendants.

_____

Tommy Davis

_____

Frances Davis

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LAW OFFICES

KAPLAN, KAPLAN & STEELMAN

SIDNEY KAPLAN
ARTHUR GUY KAPLAN*
BARRY L. STEELMAN*
KEVIN THORNTON
HARRY B. TURNER

*MD & DC BARS

PENTHOUSE SUITE
THE TOWNE BUILDING
11 E. MT. ROYAL AVENUE
BALTIMORE, MARYLAND 21202

(301) 752-2090
1-800-492-1655

6163 EXECUTIVE BOULEVARD
ROCKVILLE, MARYLAND 20852

(301) 770-3750

April 2, 1987

Howard E. Friedman, Clerk
Court of Special Appeals of Maryland
Courts of Appeals Building
Rowe Blvd. & Taylor Avenue
Annapolis, Maryland 21401

Re: Thomas Davis et ux v. DeChiaro Limited Partnership, et al
PHC No. 70, September Term, 1987

Dear Mr. Friedman:

I am writing to advise you that our office and the attorneys from our office whose appearance had previously been entered on behalf of the plaintiffs in the Circuit Court for Baltimore City was stricken by Order of Judge Joseph H. H. Kaplan on December 31, 1986. I attach hereto a copy of the Order granting our Motion to Strike our appearance.

Accordingly, no one from our office will be participating in the appeals which have been filed and we would kindly ask that the Court's docket records reflect that we do not represent Mr. and Mrs. Davis on these matters.

I thank you for your assistance in this matter.

Very truly yours,

KAPLAN, KAPLAN & STEELMAN

Barry L. Steelman

BLS:jb
cc: Mr. & Mrs. Thomas Davis
All counsel of record

Circuit Court
for
Baltimore City

111 North Calvert Street
Baltimore, Maryland 21202

JOSEPH H.H. KAPLAN
ADMINISTRATIVE JUDGE

396-5080
City Deaf TTY 396-4930

April 21, 1987

Howard Friedman, Clerk
Court of Special Appeals
Courts of Appeal Building
Annapolis, MD 21401

Re: Tommy Davis, et ux. v.
DeChiaro Limited Partnership,
et al. 86070076/CE47292

Dear Mr. Friedman:

In accordance with the Davis' request of April 11, 1987, enclosed is a copy of my letter ruling of January 13, 1987, amending my order of December 31, 1986.

Sincerely yours,

Joseph H. H. Kaplan
Administrative Judge

JHHK/kah
Enclosure
cc: Mr. and Mrs. Tommy Davis
Barry L. Steelman, Esquire

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Circuit Court
for
Baltimore City

JOSEPH H.H. KAPLAN
ADMINISTRATIVE JUDGE

111 North Calvert Street
Baltimore, Maryland 21202

396-5080
City Deaf TTY 396-4930

January 13, 1987

Barry L. Steelman, Esq.
Kaplan, Kaplan & Steelman
11 East Mt. Royal Avenue
Baltimore, Maryland 21202

Re: Tommy Davis, et ux. vs. DeChiaro Limited Partnership, et al. - 86 070 076/CE 47292

Dear Mr. Steelman:

After you called my office yesterday, I met with Judge Ward. Judge Ward advised me that he was aware of the Davis' letter of December 29, 1986, and the telephone conversation with Mrs. Davis when he denied the striking of your appearance. When I struck your appearance, I was under the impression that Judge Ward was not aware of those two salient facts. Judge Ward further advised me that he knew that you could not ethically represent the Davises against their will, but he requested that Mr. Turner be present at the trial to provide the Davises with any assistance that they may need.

I am in agreement with Judge Ward's determination that Mr. Turner should be present at trial to assist the Davises if they wish to call upon him for help. Accordingly, the trial will take place as scheduled, and Mr. Turner or yourself will be present to assist the Davises if they request the same.

Sincerely yours,

Joseph H. H. Kaplan
Administrative Judge

JHHK:sp
cc: Hon. Thomas Ward
Mr. & Mrs. Tommy Davis
S. Leonard Rottman, Esq.
Gordon B. Heyman, Esq.
Kevin P. Kennedy, Esq.
Arnold C. Taragin, Esq.
George E. Golomb, Esq.
Court File